No. 88-477

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOE MONASTERO; SAM KATZMAN; and MARLENE "MARDY" McCULLOUGH,

Appellants,

vs.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

MOTION OF APPELLEE TO DISMISS

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QUESTION PRESENTED

The question presented by this motion to dismiss is whether the decision of the Nebraska Supreme Court is a "final judgment or decree" pursuant to 28 U.S.C. § 1257(2) where

(1) The Appellants await potential conviction and sentencing for the alleged crimes as charged;

(2) The case was remanded back to the district court for further proceedings (trial).

PARTIES TO PROCEEDINGS BELOW

Parties before the Nebraska Supreme Court: (1) State of Nebraska, the Appellee herein; (2) Joe Monastero, Sam Katzman, and Marlene "Mardy" McCullough, the Appellants herein. In the courts below the Appellee, the State of Nebraska, has been represented by Robert M. Spire, Attorney General, William L. Howland, Assistant Attorney General, and Ronald L. Staskiewicz, Douglas County Attorney. The Appellants, Joe Monastero, Sam Katzman, and Marlene "Mardy" McCullough, were represented by Thomas J. Guilfoyle, of FROST, MYERS, GUILFOYLE & GOVIER in the appeal to the Nebraska Supreme Court.

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MOTION OF APPELLEE TO DISMISS

Pursuant to Rule 16.1, the Appellee, State of Nebraska, moves to dismiss the appeal filed herein or, in the alternative, to affirm the judgment of the Nebraska Supreme Court on the ground that the state litigation which forms the basis of this appeal is not a "final judgment or decree" from the highest court in the State of Ne-

braska. The Appellants, therefore, have no standing to invoke this Court's appellate jurisdiction under 28 U.S.C. § 1257(2).

STATE STATUTES INVOLVED

Neb.Rev.Stat. §§ 32-705 and 32-713 require that each ballot petition contain a circulator's affidavit in the prescribed form, whereby the circulator must swear that each person whose name appears on the petition signed in the presence of the circulator. Section 32-713 makes it a crime to "falsely swear to any signature" upon a petition and contains the penalty clause making any willful violation of any of the provisions of the act a Class IV felony.

STATEMENT OF FACTS

The Appellants were charged in the District Court of Douglas County, Nebraska, with the crime of "falsely swearing to any signature upon an initiative petition." The Appellants filed a Motion to Quash the Informations filed against them asserting that the charges were unconstitutional and violative of the First and Fourteenth Amendments to the Constitution of the United States. The Motions to Quash were consolidated. The trial court found that the crime of falsely swear(ing) to any signature upon such petition" was unconstitutionally vague.

On appeal the Nebraska Supreme Court reversed finding that the crime of falsely swearing on an initiative peti-

tion was not vague or constitutionally invalid. The Court held that a petition circulator had adequate and fair notice of the subject matter of the false swearing. The Court held that Appellants did not have standing to assert that the statute was overbroad and restricted their freedom of speech.

The Appellants brought this appeal.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE A FINAL JUDGMENT OR DECREE RENDERED BY THE HIGHEST COURT OF THE STATE OF NEBRASKA, THEREFORE THE APPELLANTS LACK STANDING TO INVOKE APPELLATE JURISDICTION PURSUANT TO SECTION 1257(2)

"Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a 'final judgment or decree'." *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 476-477 (1975). The final judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the state." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1985). In the context of a criminal prosecution, final judgment means

sentence. The sentence is the judgment. *Berman v. United States,* 302 U.S. 211, 212 (1937); *Parr v. United States,* 351 U.S. 513, 518 (1956); *Flynt v. State of Ohio,* 451 U.S. 619, 620 (1981). The present case involves criminal prosecutions in which the Appellants were charged with the crime of "falsely swearing to a signature upon an initiative petition." The Appellants are awaiting trial in the State of Nebraska. They have not been convicted or sentenced.

This appeal arises from the Nebraska Supreme Court opinion (*State v. Monastero,* 228 Neb. 818, 424 N.W.2d 837 (1988)) in which the Nebraska Supreme Court vacated the findings and judgments of the Douglas County District Court and remanded this matter to the District Court for further proceedings.

Judgment of an appellate court reversing the judgment of the lower court and remanding the cause for further proceedings, is not a final judgment, and is not appealable. *Ex Parte French,* 91 U.S. 423, 425-426 (1875); *Smith v. Adams,* 130 U.S. 167, 177 (1889); *Great Western Telegraph Company v. Burnham,* 162 U.S. 339, 341-343 (1896). Moreover, even if the appellate court considers itself bound on the second appeal by its decision on the first appeal, making the second appeal a mere formality, the second appeal is a prerequisite to Supreme Court review. *McComb v. The County Commissioners of Knox County, Ohio,* 91 U.S. 1 (1875). It is clear that there have been no final judgments.

The Appellants contend that this appeal is a final judgment pursuant to *Cox Broadcasting Corporation v. Cohn, supra.* We find that their arguments are not frivolous, but unsound. The Appellants contend that this appeal fits into the first category as mentioned in *Cox.*

> In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive *or* the outcome of further proceedings preordained. (emphasis supplied).

Id. at 479.

The outcome of further proceedings in the state district court is not preordained. There has been no conviction or sentence. This case is not even close to being concluded at the state level.

The Appellants concede that the second and third categories as set out in *Cox* do not apply in the present case. However, the Appellants contend that this appeal fits within the fourth category of cases mentioned in *Cox, supra.*

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-483.

It seems apparent that if this Court reversed the judgments of the Nebraska Supreme Court on the federal issue regarding the First Amendment of the United States Constitution, there would be no further proceedings in the state court in these cases. "But the question remains whether delaying review until petitioners are convicted,

if they are, would seriously erode federal policy within the meaning of our prior cases." *Flynt v. State of Ohio,* 451 U.S. at 622. We are confident that this would not be the case because initiative petition drives have succeeded since the failure of the lottery petition drive. This Court does not have a final judgment before it.

Any contrary conclusion would allow the fourth exception to 28 U.S.C. § 1257 to swallow the "final judgment or decree" rule.

Moreover, this Court in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973), stated the policies behind the final judgment rule as follows:

> The finality requirement of 28 U.S.C. § 1257 [28 U.S.C. § 1257] which limits our review of the state courts judgments, serves several ends: (1) It avoids piecemeal review by federal courts of state court decisions; (2) It avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) It limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Id. at 159.

The requirement of finality is not met merely because the major issues in a case have been decided and only a few loose ends remained to be tied up, *Republic Natural Gas Company v. State of Oklahoma,* 334 U.S. 62, 68 (1948).

———o———

CONCLUSION

For the foregoing reasons, the appeal docketed by the Appellants should be dismissed. The appeal before this Court is not a final judgment or decree within the meaning of 28 U.S.C. § 1257(2). The Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Nebraska Supreme Court.

Respectfully submitted,

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